OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Travis Co.

Honorable Geo. H. Sheppard
Comptroller of Public Accounts
Austin, Texas

Dear Sir:

Opinion No. O-2514
Re: Whether or not a merchandise display room in which orders are taken, but which are filled by the merchandise being sent to the customer from a warehouse located elsewhere, are stores within the meaning of chain store tax law.

This is in answer to your request for an opinion concerning the liability of certain mail order establishments for chain store taxes, which reads in part as follows:

"A certain mail order house of the State of Texas has a number of mail order houses situated in various sections of the State in which they have merchandise on display and also catalogs from which the orders for merchandise are made. The purchaser may enter the office where the merchandise is on display and select any item from those on display or from the catalog and sign an order blank for such merchandise, the order is then mailed to the office, or warehouse from which the merchandise is shipped to the purchaser's address. Or, in some instances, the merchandise is shipped back to the suboffice and the purchaser calls for the merchandise and pays for it. The purchaser may pay for the merchandise at the time he makes the order.

"We have a number of concerns operating display rooms in the State of Texas in

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which merchandise is displayed. The customer calls at this place of business, makes a purchase from the merchandise on display, and later the concern delivers to the customer, either by its own trucks or by parcel post, the merchandise purchased.

"Does either of these two places come within the definition of a store as set out in the Chain Store Tax Act?"

In your statement of the facts you indicate that some of the places have, and some do not have, mail order catalogs which may be used by customers in making merchandise selections. We do not believe that difference in the places have any effect on the answer to your question. We also believe that the manner in which the merchandise is paid for is immaterial in deciding the answer to your question.

As to whether or not the display rooms in question are stores is determined by the definition of the term "store" in the Texas Chain Store Tax Law (House Bill 18, Ch. 400, Acts 44th Legislature, First Called Session, 1935. Codified as Article 1111d, Penal Code), said definition reading as follows:

"Sec. 7. The term 'store' as used in this Act, shall be construed to mean and include <u>any store or stores or any mercantile establishment or establishments not specifically exempted within this Act</u> which are owned, operated, maintained, or controlled by the same person, agent, receiver, trustee, firm, corporation, copartnership or association, either domestic or foreign, <u>in which goods, wares or merchandise of any kind are sold</u>, at retail or wholesale." (Underscoring ours)

The part of the definition with which we are concerned says that "the term 'store' * * * shall * * * mean * * * any store or stores or any mercantile establishment or establishments * * * in which goods, wares or merchandise of any kind are sold." Therefore, if these display rooms are (a) "mercantile establishments" and are (b) places "in which goods, wares or merchandise of any kind are sold," they are

"stores" within the meaning of the Chain Store Tax Law.

We will first discuss whether or not they are mercantile establishments. The statute includes "any store * * * or any mercantile establishment." By the use of both terms, "store" and "mercantile establishment", the Legislature apparently intended for them to have different meanings. In other words, they do not mean the same thing, but the term "mercantile establishment" means something different than a "store". In the case of Texas Bank & Trust Co. v. Austin, 115 Tex. 201, 280 S. W. 161, the Supreme Court of Texas said:

> "* * * no rule of statutory construction is more universally recognized than that which compels the courts to give some effect to every express declaration of legislative intent. The rule is clearly stated in M. K. & T. Ry. Co. of Texas v. Maharfey, 105 Tex. 398, 150 S. W. 881, citing Justice Harlan's opinion for the United States Supreme Court in Montclair v. Ramsdell, 107 U. S. 152, 2 S. Ct. 395, 27 L. Ed. 431, where it is said:
>
> "'It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed.'"

In the case of Banks v. State, 28 Tex. 644, the appellant had been convicted of violating the statute making it a felony to steal "any horse, gelding, mare, colt, ass, or mule," and the court held that by using the words "horse" and "mare" the Legislature intended for them to mean different things and that the word "horse" in the statute did not include "mare" even though the term "horse" ordinarily was a generic term that included mare. In that case the court said:

> "* * *. It is our duty to give to the article such a construction as will give effect and meaning to each word as nearly as can be consistently done with the object and purpose of the legislature. * * *."

We have been unable to find any Texas case defining the term "mercantile establishment," but we do have a Texas definition of the ordinary meaning of the word "store." In the case of Continental Paper Bag Co. v. Bosworth, 276 S. W. 170, the Commission of Appeals of Texas said:

> "In American usage, the word 'store,' when employed to designate a place of business, is a broad one. It signified not merely a warehouse, storehouse, or storeroom, but may include in its meaning a business establishment where personalty is kept and sold, and incidently gotten in salable condition." (Underscoring ours)

Thus we see that a store is "a business establishment where personalty is kept and sold." We believe that the Legislature intended for the term "mercantile establishment" to apply to something different than a store.

The term "mercantile establishment" is defined in 21 Corpus Juris 904, as follows:

> "A place where the buying and selling of articles of merchandise as an employment is conducted."

The same definition of a "mercantile establishment" was used in the cases of Continental Baking Co. v. Campbell, 176 Okla. 218, 55 P. 2nd 114. It will be noticed in that definition that it does not say that merchandise is kept and sold in a mercantile establishment as is the case of a store (Continental Paper Bag Co. v. Bosworth, supra), but it only says that buying and selling as an employment is conducted in a mercantile establishment. Therefore, we believe that the fact that the merchandise that is sold is not kept in the place, but that only samples are kept there, does not prevent it from being a mercantile establishment.

We will now discuss whether or not these display rooms are places "in which goods, wares or merchandise of any kind are sold." Ordinarily a sale takes place where title to merchandise passes. We are of the opinion, however, that from a reading of the chain store tax statute in its entirety, it is evident that the Legislature was attempting to tax a place of business at which merchandise was sold,

meaning the place where the transaction took place rather than the place where the actual title to said merchandise passed. As stated in 55 Corpus Juris 36, "However, as used by the authorities, 'sale' is not a word of fixed invariable meaning but may be given a narrow or broad meaning, according to the context or the surrounding circumstances and the conduct of the parties".

In many instances under the facts presented, title to the merchandise did not actually pass except upon delivery. However the transaction of the sale took place at the display or order room. The question then is whether or not the Legislature intended to tax the place of delivery where title passed or rather on the other hand, intended to tax a place of business at which the business transaction took place. We believe it to be the latter.

In this connection it is important to note the language of the Commission of Appeals of Texas in the case of Hurt v. Cooper, 130 Tex. 433, 110 S. W. (2d) 896. In construing the exemption in Section 5 of the Act, which applies to manufacturing concerns distributing products of their own manufacture, the courts stated that such places of business do not come within the affirmative operation of the Act regardless of the exemption. The court said that the "test is whether sales of goods, wares, or merchandise are made at the place." In pointing to places of business at which sales of goods, wares or merchandise are not made at the place, the Court said:

> "It may be that some manufacturing concerns maintain bona fide distributing points at which no sales are made, but from which they merely distribute at wholesale to their stores or at retail to purchasers from their sales agents. If so, such business would appear to be within the terms of this provision. Obviously they would not come within the affirmative operation of the statute as we have construed it, and therefore no express exemption was required to relieve them from the burden of the tax."

The language of the Supreme Court above quoted supports our conclusion to effect that the distinction is between a place of business on the one hand which is merely a distributing

point and a place of business on the other hand at which sales of merchandise are made in the sense that the transactions take place therein.

Under such construction, it is our opinion that all of the display rooms mentioned, including those in which the delivery is not made through such display rooms to the purchaser, are mercantile establishments at which goods, wares and merchandise are sold within the meaning of the Texas Chain Store Tax Act, and are therefore subject to the tax.

Yours very truly

ATTORNEY GENERAL OF TEXAS

APPROVED AUG 28, 1940

Gerald Mann

FIRST ASSISTANT
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BG:RS

APPROVED
OPINION
COMMITTEE
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